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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES WADE ROBERTS, Defendant and Appellant.	A121908 (Lake County Super. Ct. No. CR910879)

James Wade Roberts appeals from a conviction of first degree murder. He contends the conviction must be reversed because the trial court erroneously permitted the prosecutor to question an expert witness about post-arrest circumstances involving appellant's constitutional privilege against self incrimination, and because the prosecutor engaged in misconduct. We affirm.

STATEMENT OF THE CASE

Appellant was charged by information filed on February 23, 2007, with the murder of Ruth Donaldson. It was alleged that appellant personally used a deadly weapon in the commission of the offense, and that he had suffered five prior felony convictions within the meaning of Penal Code section 1170.12, subdivisions (a) through (d),[1] and section 667, subdivisions (b) through (i) and (a)(1). Appellant entered a plea of not guilty by reason of insanity.

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

On August 27, 2007, defense counsel declared a doubt as to appellant's mental competency under section 1368. The evaluators appointed by the court concluded appellant was competent to stand trial; appellant waived his right to a jury trial on the issue of competence and, after a hearing on December 3 and 11, the court found appellant competent to stand trial.

Jury trial began on February 13, 2008, with the first evidence presented to the jury on February 26. On April 10, the jury found appellant guilty of first degree murder and found the deadly weapon use allegation true. Appellant admitted the prior conviction allegations. The sanity phase of the trial was held on April 15, and the jury returned a verdict of sane the same day. On May 9, appellant was sentenced to a prison term of 86 years to life.

Appellant filed a timely notice of appeal on June 20, 2008.

STATEMENT OF FACTS

Jill Mancuso, appellant's mother, lived with appellant, her sister-in-law Donna Haggart, Haggart's son Jacob, Ruth Donaldson, and Donaldson's boyfriend Danny Center. Appellant had one of the two bedrooms in the garage and Donaldson and Center shared the other. On the morning of October 15, 2006, Mancuso saw appellant and his girlfriend Lynn Boomgaarden in the drug store parking lot, laughing and appearing to be having fun, and exchanged greetings. About 10 minutes later, when Mancuso returned home, appellant pulled up, alone, and told Mancuso to get into his truck. He was very upset and angry. Mancuso asked to be taken home and appellant refused; Mancuso became upset and began crying because appellant was so agitated; they yelled at each other, and appellant took her home.

Perhaps 20 minutes later, Mancuso was fixing a bookcase in the bathroom when appellant came in, asked what she was doing, then left. Mancuso answered a telephone call from Boomgaarden, who said she and appellant had had an argument. When she got off the phone, Mancuso saw appellant; he "looked funny," and she asked what was the

matter. Appellant asked, "[w]here are the sleeping bags?" Thinking he was going to go camping on the river because of his argument with Boomgaarden, Mancuso told him he could not do this because it was cold weather. He said he did not want it for camping and, when she asked what he wanted it for, appellant said he had "whacked" Donaldson on the forehead. Mancuso told appellant to go see if Donaldson was alright while she called an ambulance. She was becoming hysterical and scared because appellant "seemed very odd-like, a wax person or something, just strange." She told him she would check on Donaldson and he should call the ambulance, and appellant said, "no, I think I whacked her." Mancuso told him not to say that; she testified that even as a child appellant had said "crazy stuff" because he liked to "shock" her. Asking how this could have happened, she went into the living room and started to call 911. Appellant said "he didn't do it, that God just used his body to do it," and Donaldson "had the eyes; she was evil; she had to be stopped; she was the evilness in this house; don't you understand it?" Appellant "gently but firmly" unhooked the phone, took it to the other room, and told Mancuso to stay where she was. Mancuso ran outside and ended up next door. She remembered being put into a police car, turning around and seeing appellant sitting on the stairs as though smoking a cigarette. At one point appellant said, "well, at least I saved the house."

Mancuso testified that, during the preceding couple of months, appellant had become unable to engage in the long discussions they had always had and would "say things like he'd been to heaven and back to earth, and that he had to go on an Isaiah trek," making Mancuso think he "[did not] want to be serious about anything." Appellant would talk about Mendocino being "full of nuclear weapons and jeeps" and "bunkers that we don't know about," and said the water was being poisoned. Once he told Mancuso he had just gotten back from heaven and "gotten his orders for the day." Appellant would be Jesus one day, God another, then "a worker for God" and often Isaiah. In about August 2006, appellant ran into the house and went behind the couch, saying several cops

had been killed in Fort Bragg and Santa Rosa and "I was given a power and I tried it and it worked." When Mancuso turned on the news and nothing about this was reported, appellant said, "God blocked it. He doesn't want it—he doesn't want the media to know yet or something." The incident scared Mancuso and she called her children, Nanette and John, who lived in Nevada. Appellant continued to display bizarre behavior, such as running stop signs and saying he was "invisible to the police force." He thought he was on a mission for "higher ups" and talked about himself and selected others having been "commissioned by God" to save the world. Appellant would tell Mancuso to read certain verses in Isaiah to understand what he was saying, but they did not make sense to her. Appellant had talked about the same sorts of things years before, when he was in Pelican Bay Prison. In the three or four months prior to October 15, appellant had told Mancuso that there was a demon inside Ruth, "that her eyes were black inside her head." He had said this about six or eight other people who had come to the house as well.

Clearlake Police Officers Greg Piccinini and Brett Rhodes responded to the scene at 12:14 p.m. Mancuso, who was at the house next door, crying hysterically, told Piccinini that appellant had asked her where the sleeping bags were and, when she asked why, said "so he could get rid of Ruth." Mancuso asked, "What have you done," and appellant commented that "God had made him do it; she was the evil spirit of the house." Mancuso related that she tried to call 911 and appellant took the phone away, saying "were you going to turn me in?"

The officers went to Mancuso's house and saw appellant sitting on the porch, calmly smoking a cigarette. Inside, in one of the garage bedrooms, Rhodes found a woman seated on the floor at the foot of the bed, with her legs extended outward and her neck tilted backward, a rope around her neck and abrasions on her neck, bleeding from her abdomen and not responsive. She was warm to the touch, her eyes were fixed and dilated, and Rhodes found no pulse and no evidence of breathing. There was a large knife on the coffee table next to the bed.

Appellant was transported to Redbud Hospital, where Clearlake Police Officer Martin Snyder participated in the collection of evidence. Snyder observed a nurse take two blood samples from appellant, an hour apart, and overheard her ask appellant whether he had used any drugs in the last 48 hours. Appellant responded that he had used methamphetamine the night before and smoked marijuana that morning. Forensic toxicologist Daniel Coleman testified that both samples tested positive for methamphetamine and amphetamine, at a concentration at the lower end of what would be considered street usage, consistent with ingestion the night before the blood draw or ingestion of a smaller amount the morning of the draw. Appellant's blood screen was negative for marijuana, but this did not rule out his having used it because the amount could have been below the threshold for detection.

Forensic pathologist Kelly Arthur performed an autopsy on Donaldson and determined that the primary cause of death was a stab wound to the chest; there was a single wound on the outside of the body but multiple wounds inside, indicating the weapon had been redirected multiple times. There were also ligature marks on Donaldson's neck and face consistent with ligature strangulation. Tiny hemorrhages in her eyes and on her face, as well as the quantity of blood in her chest cavity, indicated that the strangulation preceded the stabbing and that Donaldson was still alive when she was stabbed. The stab wounds would have taken a "significant amount of force" and Donaldson would have died from them within a couple of minutes. The knife found at the scene was consistent with Donaldson's wounds.

Lynn Boomgaarden had lived with appellant for almost four years and knew he had mental health issues. When she first met appellant, he was taking Seroquel and "did nothing but sleep 24 hours a day," but he stopped taking the medication at her request and began to function properly. Appellant was fine for a year or two, then over the year and a half preceding Donaldson's death he began to act in a "bizarre" manner, talking and writing letters about being the prophet Isaiah, telling Boomgaarden to read pages of the

Bible, and saying he was "a punisher for God." Appellant "had his own language, . . . his own way of figuring how people where [*sic*] by numbers"; he would say he was the leader of the Hell's Angels, was an agent for the CIA, and had been hired to smuggle nuclear arms from Middletown to Oregon; and he could hear God telling him things in his head. This was increasing during the six months before Donaldson's death, as a result of which Boomgaarden was "trying to move away" and asked Mancuso to put appellant in a hospital. Shortly before Donaldson's death, Boomgaarden had spoken with appellant's doctor about referring him for psychological help.

The night before Donaldson's death, appellant and Boomgaarden stopped at their friends' house on their way to a Black Crowes concert. Boomgaarden thought they had a beer there, but they did not use any drugs. Appellant said something about the four friends having sex together, which made Boomgaarden angry for the rest of the evening. It was very unusual for Boomgaarden to get this angry with appellant; they "never really argued." Appellant was calm throughout the evening despite Boomgaarden's anger. After the concert, she dropped appellant at home and went to her mother's, telling appellant to come over in the morning.

The next morning, Boomgaarden apologized to appellant and they had coffee with her mother, then went to the drug store and saw Mancuso in the parking lot. When appellant dropped Boomgaarden at her house, he wanted to go for a ride in the Lakeport mountains. Boomgaarden did not want to go because "he didn't look right in his head, in his eyes I mean" and, although appellant had never been violent toward her, she "figured that look would make me not come back from the mountains." She later clarified that she did not think she would die, but that there might be "a crazy mental thing that we would go through where he'd be Isaiah again for hours and hours." Boomgaarden testified that appellant sometimes "goes blank . . . his eyes go glazed and he's not there." When this happened, he would answer if you talked to him, but "he's not him. . . . He's a whole different person." On this occasion, the look in appellant's eyes was new and "scary"; he

"looked like he had no soul anymore." She told appellant to come back in an hour and they parted cordially. When he did not return, she called his house and his aunt said they thought appellant had just killed Donaldson. Boomgaarden did not call to tell Mancuso about her argument with appellant the night before, but thought she had told her earlier, in the parking lot. All that week she had been telling Mancuso that she "needed to get serious" about appellant's problems.

Defense

Janet Lynn Roberts began to date appellant in the late 1980's and they had a daughter who was born in 1992. Appellant had been a "happy-go-lucky, great friend to all," but while in prison he changed, becoming "more distraught" and "more paranoid," and talking about talking to God in a way that indicated he believed he was "ascending and descending" from the heavens. After his release, Roberts saw appellant when he came to visit their daughter. In April 2006, Roberts found appellant's "personal treasures"—such as model motorcycles, "treasured pictures and things from his daughter"—on her front porch and thought he was suicidal. In the fall of 2006, appellant told Roberts that Armageddon was coming; the world was going to end.

Appellant's sister, Desirae Roberts, testified that their stepfather abused appellant emotionally and physically; she had seen him hit appellant with a hammer, hit him in the face, choke him, beat him with a leather belt, and throw him on the floor and beat him with his fists. Appellant left the house when he was 13 and lived with his natural father or his uncle, and the siblings were not allowed to see him. Roberts testified that appellant was religious; they would talk about God and appellant would always advise her to put things in God's hands. Before appellant went to prison, these were normal religious conversations. After appellant was released, he described to Roberts an experience in which angels descended into his cell and prayed over him, apparently believing they had actually come into his cell to protect him. Appellant said he was Isaiah and had been "sent here to save big groups of people, to bring them to certain areas to get away from

the nuclear bombs under the ground," and appeared to believe what he was saying was true.

Mancuso testified that appellant lived with her and her husband for about five or six years, until he was 15. She agreed that her husband was abusive toward the children at times; she observed the verbal abuse, but the physical abuse occurred when she was not there. She testified that appellant "probably suffered the worst. He couldn't do anything right." He became withdrawn and unhappy.

Appellant's sister, Nanette Merbach, testified that their stepfather frequently beat all five children with his belt or a wooden paddle, and called appellant a "stupid idiot" all the time. Appellant had been happy and playful, but reacted to the abuse by making himself a hermit in his room. Merbach noticed radical changes in appellant during his incarceration. While appellant had been religious in a "normal" sense, in prison his letters became "bizarre," advising Merbach she needed to put her children in the garage for safety, because the bad people were coming and the Apocalypse was coming, and applying scripture in a way that did not seem rational. Appellant's letters also reflected paranoia: He said people were trying to poison him and probably her too, he had been kidnapped, and the CIA was coming. Appellant wrote about hiding weapons in Oregon and needing to get them out of Hidden Valley. Merbach had received about 200 such letters since the early 1990's.

In August 2006, Merbach and John Roberts, a brother who lived in Carson City, went to Clearlake because Mancuso was very upset about appellant acting abnormally. Appellant's room, normally immaculate, was in disarray, with pencils used "down to the core" and a pyramid shaped stack of cigarette butts from smoking while he wrote "tons of letters." Appellant gave Merbach a letter in which he said he needed her help to distribute letters to save people from weapons buried in Clearlake. She and her brother went to the police because she was afraid appellant was going to hurt himself, but they were told there was nothing the police could do. Merbach and her brother tried to talk to

appellant about it and he insisted that he was fine, but said he would think about it and maybe go to the mental institution in a couple of days. Between August and October, in telephone conversations, appellant did not make sense, always talking about the Bible and helping to save people.

Clearlake Police Officer Raymond Brady knew appellant by sight. Prior to October 2006, appellant gave Brady a "bizarre" letter that discussed the Lord and random subjects in "nonlinear" fashion. Subsequently, appellant's stepson gave Brady two letters from appellant, which reflected the same type of "nonsensical, nonlinear thought pattern, references to God."

Appellant, 46 years old at the time of trial, described having been physically and verbally abused by his stepfather almost daily, stating that he had a harder time than his siblings because he would rebel against the stepfather's orders. He had been happy before his mother met his stepfather, but as a result of the abuse "started hating the world." When he went to live with his father, his stepmother did not want him there and he "went on a little juvenile crime spree" and ended up at the Sonoma County Youth Camp. At 17, he got a job in construction, then in 1980 was convicted of robbery and incarcerated until 1984. He had various jobs in construction until he returned to prison after being convicted of four counts of assault with a firearm in 1991.[2]

While at Pelican Bay Prison, appellant tried to kill himself by cutting his throat, thinking he would stop the racial tension by eliminating himself and "put it in God's hands."[3] He was taken to the infirmary and then to the segregated housing unit (SHU),

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[2] Appellant testified that he was not guilty and his case was on appeal: "I believe that verdict was directed. The jury was crying and said I was not guilty, but they said the judge and the D.A. made them find me guilty, so that case is still up in the air."

[3] Appellant testified that while he was at San Quentin, there was an incident in which black inmates accused him of being a racist and threatened to kill him, and he was placed in administrative segregation for several days, then sent to Pelican Bay. At Pelican Bay, the "cops and the freeman over my case in 1991 were setting me up to get me killed on the yard," trying to "make it a racial dispute" and "get the Nortenos and

where he stopped eating for 90 days and lost 100 pounds. He was forcibly medicated with Haldol, although he did not believe he had ever been mentally ill. Appellant testified that in his prison file "I mentioned a lot of divine intervention. I've had 20 cops come and drag me out of my cell and beat my ass and I'm standing there in total bliss." Appellant described incidents in which guards put him in waist chains and leg irons and stood on the back of his knees, jumped on his back or "stomp[ed]" his head into the concrete, saying he called to Jesus for help, then "after a certain point, I wasn't weak anymore. I just started becoming stronger and stronger and stronger." Appellant thought "God's putting me through this because he's preparing me to talk to me directly and stuff like that" and thought voices were being "beamed into" his head.

Appellant testified that the Seroquel he was required to take as a term of his parole made him into a "zombie." When he met Boomgaarden, she told him he had "no life" and he started tapering off the medication, stopping it completely around the time he was released from parole. After being paroled, he was unable to find work because of the effects of the Seroquel, back problems and a case of pleurisy. He filed for social security and was found to be disabled, but he could not remember what the disability was found to be. He recalled "going through a lot of changes," with "a really rough period there towards the end," but he did not recall the things his siblings said he said and did not know what his mental state was. Over the year before Donaldson's death, "things started happening . . . there's forces in the universe . . . that kind of compel you to do things." This was when the "letters started coming out" and people said he was "getting abstract." Appellant would "flat-line," which he explained as going "blank right in the middle of a conversation," not just losing track of thoughts, but "like there's nothing there." He did

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Blacks to rise up against me," as a result of which "now we have a big clash going on between the Blacks and the Whites." Appellant denied being a racist and testified that his tattoos (a "Nazi war bird" and a "Viking" with a swastika on it) were really religious, not racist.

not remember talking about weapons being stored in Lake County, but was concerned about nuclear waste being trucked from the military station in Middletown to Oregon and terrorists getting hold of it.

Appellant described receiving information from God about national security, which he relayed to the FBI.[4] He testified, "[a]nd I'm compelled to write [the thoughts] down. I can't tell them no. I don't have any thoughts when it happens. It just takes you over and makes you do it. There's nothing there to it. It's like I don't have control of my own body. I don't have control of my own mind. It's just you can't tell it no. And it compels me to do these things, and there's nothing that I can do about it." Appellant explained that "Isaiah came into play" when he was reading material from a forensic psychiatrist related to an Ex-Offenders Anonymous group he was trying to form and reading about "the therapeutic features, Incest Survivors Anonymous and all that . . . something overtakes me and says Incest Survivors Anonymous, that's the first three letters of Isaiah. The last three letters of Isaiah is IAH is IME. This isn't my doing." Appellant described being overtaken "like the Holy Ghost or something puts it in your mind . . . like an anointing or something."

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[4] Appellant testified, "maybe he's trying to wake us up about some things, especially after 911." Appellant believed that Jesus was executed partly as a "product . . . of freedom of religion," but also as a "product of a corrupt judicial system," without a fair trial, and that the trial judge, prosecutor and United States Supreme Court were guilty of murder because of the ruling that it is not illegal to execute an innocent man if he got a fair trial. Appellant believed that he was "left defenseless" in his last trial and "they're also trying to do that again in this trial," and "when you leave one person defenseless, it leaves the entire country defenseless." He believed this defenselessness enabled Al Queda to come in "through California and orchestrate[]" the 911 attack, that there was a "911" in 1941 when a German submarine was involved in a scrimmage with an American ship, that this was followed by the attack on Pearl Harbor and "we have another 911 . . .and we still haven't had our Pearl Harbor yet." Asked whether he thought there was going to be a Pearl Harbor, appellant said, "Not now, but I think I kind of took care of all that, didn't I?" He explained that he took care of it by writing to the FBI and "told them everything, we needed to restore Homeland Security and all the problems going on in the country right now."

Appellant described writing things down and making maps about an area of Lakeshore where missiles were being put, "this World War III thing," and sending it to the Hell's Angels in Sonoma County.[5] He testified that he believed Donaldson "opened my home to invasion when she was relating that information about what was going on with me in the house." Donaldson's ex-husband rode with the Hells Angels and she was involved in real estate deals with "these people," while appellant was a member of the Aryan Brotherhood and "we don't get along with the Hell's Angels." Appellant believed God was talking to him by "showing me these things, compelling me to go these places and write these things down and send that stuff to Sonoma County. . . . And maybe he chose me because I'm the one who's been around those people and been to prison, that would be able to decipher it all. That's the best I can make of it. [¶] Now, like I said, a lot of details were not filled in until I was in my jail cell here until after Ruth's death."

[5] Appellant described several incidents that made him think "something weird" was going on, one of which involved two white men and a "Black Panther" who were in line with him at a market and gave him "an ill feeling." Appellant said it came to him later, when he was in jail after Donaldson's death, that the men at the market were the ones who had killed some cops who, according to local rumor, had gone missing from the Clearlake Police Department. Other incidents included thinking the maintenance man at Boomgaarden's mother's apartment had the apartment bugged, and noticing a guy driving without a license plate, wearing a "beanie . . . like he'd been to prison, a red truck which was related to Hell's Angels," and another guy with a motorcycle that did not have a license plate, and thinking "these guys got ties to DMV or [the former chief of police]." "Jan" took appellant into Boomgaarden's son's room and motioned to tell him "they come in through the window and they brushed Paul and better not say a word." Appellant knew "something's up. And it has to do with the stuff, the information, I was sending to Santa Rosa." Appellant was "thinking these guys are coming through the window, and they're raping Lynn, whatever . . . trying to put pressure on me to back up." Appellant believed the Hell's Angels were trying to put pressure on him, and the police were involved. He talked about being shown that men were disabling women's cars in the market parking lot, then surrounding the women when they went to use the pay phone and abducting them, taking them to Konocti and Las Vegas, using them for "the illegal baby market" or prostitution.

Appellant testified that things were chaotic at his mother's house during the year before Donaldson died; Donaldson and Center were always using methamphetamine and "[n]obody had their shit together." Appellant started "flirting" with methamphetamine when he got off parole, but he never considered himself an addict. He and Donaldson "always got along great" and he did not recall ever saying or feeling that Donaldson was "evil" or "an evil spirit in the house."

Appellant remembered going to the Black Crowes concert the night before Donaldson died, but did not remember having an argument with Boomgaarden. Something happened to his eyes at their friends' house, which had happened on other occasions, where his eyes got "big and black" and he felt "an energy around [his] eyes," "like God's absorbing something in a material world in a sense, and it's being relayed to spirit, so he could decipher what's going on, or whatever, and filters it and then kind of relays that to me, and that's how I respond." He thought he used methamphetamine the night of the concert, before Boomgaarden arrived, but was not sure. He did not know whether he smoked marijuana that night or the next morning, or whether he took methamphetamine that morning.

Appellant "vaguely" remembered going to Rite Aide on October 15 and remembered being in his truck with his mother, getting into a small argument, then dropping her off. He said this was right after a conversation in the kitchen with Donaldson and Boomgaarden in which Boomgaarden was saying the Hell's Angels do not understand appellant after Donaldson said, "you guys are in trouble unless [appellant] slows down because they're highly upset right now. And that's what sent me ballistic, anxiety attacks and stuff." He remembered being with Donaldson at the washer and dryer in the garage. His mind was "scattered. I don't have thoughts of my own. This thing compels me, and I'm not thinking about this. This isn't even a thought in my mind. I'm blank. It's kind of like when the spirit moves you, you go." He grabbed a cord and wrapped it around her neck. "She turns—it's like she's directing this thing now, not me.

I wasn't even directing it when I did the cord thing. Something else. Like I said, there's powerful forces in the universe, and they're working or something. This is not a product of me. I'm not a killer. I'm not that way at all." Appellant remembered strangling Donaldson to death, believing that she was dead because of "[t]his outside force telling me when to stop." He testified that his mind was blank and "this same thing that was leading me must have led her, because as soon as I did that, she turned around and she opened the door to my room, like she knew already what was going on, and something else was leading us. It was a power beyond explanation and beyond our control."

Appellant was going to put Donaldson in a sleeping bag, but "[t]his thing won't let me do it. I sit in that chair where they had the knife, in the pictures. I'm sitting in that chair, and I'm not knowing what to do. I'm blank. This thing tells me you've got to stab her. I'm, God, there's no way." Appellant described this as "an inner knowing," and "[n]ext thing I know, boom, now I'm compelled." Although he "couldn't even handle stabbing" Donaldson, the thing compelled him to do so and directed where the knife went. Appellant testified that Donaldson was lying on her back when he stabbed her and it was impossible for him to have stabbed her in the heart or lungs; he believed the pathologist had lied and, with the prosecutor, "trumped this story up to prejudice the jury." Appellant said he did not know why the "thing" was compelling him to kill Donaldson; he always thought she was his friend. "When it starts filling in these blanks while I'm in jail, that's when I wrote and told you then, if this is the case, then Ruth is a casualty of war; she's not a murder victim. [¶] . . . [¶] If these guys are in fact responsible for the 911 attack and we got soldiers in Iraq, this was not a product of my doing; this was a product of something else. This is divine intervention." He believed Donaldson was a "casualty of war" because "of what I highlighted about the judicial system and the judicial system being responsible for 911 and Iraq. And its kicked off World War III of the battle of Armageddon. At the time I didn't know, when I killed Ruth, that all that played into this. I didn't know that until I was in jail and it told me that

she was a casualty of war, because we had to highlight the problems. . . . I've listed probably 30 or 40 different ways that the judicial system has opened our country to invasion." Appellant thought "the reason [he] received this anointing is because my life is most conducive to the situation" and "its not going to break me." "I did write letters about Armageddon, the battle, the battle plans, weapons to use, designed weapons in my cell—I related those to [defense counsel], and he related those to the FBI—submarine minefields, things like that. These things are not a product of my mind. These things are a product of this anointing." Appellant testified, "I don't think God is an evil God. I don't think this was an evil thing. I think it's sad that [Donaldson] died because she was my friend. But it's out of my hands. I'm not the one who determined it. It's something that happened and was beyond my control."

Psychologist Albert Kastl was initially appointed to be a confidential consultant to appellant's defense. He evaluated appellant through interviews and psychological testing, review of extensive records including prison records, criminal history reviews and reports from 15 or 20 mental health professions who had examined appellant over the course of his incarceration, and interviews of Mancuso, Boomgaarden, John Roberts and Merbach. Over the course of the evaluation, appellant became "quite friendly and talkative." Appellant's overall IQ was in the average range and tests indicated he was not malingering (intentionally exaggerating his deficits). Some of appellant's responses to a Rorshach Inkblot Test indicated paranoia, and results on the Thematic Apperception Test showed loose association, grandiosity and psychotic thinking. Appellant's suicide attempt, and belief that he was hearing from God, indicated that he was "operating on a psychotic bases [*sic*]."

Kastl believed the definitive diagnosis for appellant was schizoaffective disorder, a combination of schizophrenia and bipolar disorder, and testified that similar diagnoses were reflected in appellant's records. One or two of the psychological reports Kastl reviewed opined that appellant had had a single psychotic episode, but the majority

diagnosed disorders involving schizophrenia and bipolar disorder; most mentioned antisocial features and two or three viewed antisocial personality disorder as the primary diagnosis. Kastl believed appellant had features of antisocial personality disorder, which is not a psychotic condition, "but there's a level of grandiosity, paranoia, suspiciousness that is a notch above that, and that brings us into the psychotic world." Appellant's records indicated that he was first diagnosed with schizoaffective disorder after his 1994 suicide attempt, and that the disability for which appellant was granted social security payments was "schizo-affective disorder, drug and alcohol dependence in remission, and antisocial personality disorder, and obesity." Kastl testified that methamphetamine can cause a psychotic disorder with delusions, but ruled out methamphetamine induced psychotic disorder with delusions while appellant was in prison because he did not think amphetamines were that available.

Kastl reviewed about 50 letters written by appellant and testified about the contents of two as examples of how they reflected appellant's mental illness. One, written to Boomgaarden, contained "grandiose, bizarre and idiosyncratic material," reflected "his internal preoccupations, his grandiosity, his concern with aggression, his concern with being physically powerful," and had "nothing to do with the person it's addressed to." Another contained Bible verses and commentary on them, then "degrades into a rambling commentary on his personal opinions."

Kastl testified that appellant's condition produced "specific effects," including "distortion of reality, particularly thought beaming, thought transmission and hearing voices, quotes, 'from God.' " These factors "greatly impact[ed]" appellant's functioning because he was likely to be guided by his hallucinatory experiences rather than reality. Examples from appellant's prison records included his saying that he assaulted inmates and staff because he felt "compelled" and believed he could read the officers' minds and they wanted him to attack them, telling correctional officers he was refusing to eat because he wanted to find God or get closer to God, and telling a correctional officer he

had attempted to kick, " 'Nothing against you. I'm just trying to find God.' " Kastl believed that when appellant stabbed Donaldson, he was "in a state of agency," meaning he was "in the thrall of a specific voice, directing him to proceed with the use of the knife." A person in this state is not able to think through what they are doing "because they feel under compulsion" and "can make only the response that they're directed to produce."

Rebuttal

Psychiatrist Douglas Rosoff, appointed to evaluate appellant in March 2007, disagreed with Kastl and diagnosed appellant as suffering from an antisocial personality disorder, a lifelong pattern of behavior consisting of failure to conform to societal norms, deceitfulness, impulsivity, failure to plan ahead, irritability or aggressiveness, recklessness, disregard for others' safety, irresponsibility and lack of remorse.

Rosoff first met with appellant on March 26 in an interview room at the Mendocino County Jail. When Rosoff introduced himself, appellant initially did not respond verbally; eventually he said, " 'I'm not talking to no goddam doctor.' " Appellant was in a "foul mood" and was wearing a "black box," a restraint that immobilized his hands in front of his belly and looked painful to Rosoff. Rosoff attempted to talk to appellant again on March 30, at the facility where appellant was incarcerated, and appellant declined to meet with him. On February 4, 2008, appellant was brought to an interview room to meet with Rosoff, not restrained, but remained mute in response to Rosoff's questions, looking downward and periodically smirking. Appellant did not get angry or act impulsively, even when Rosoff asked confrontational questions to try to "get a rise out of him."

Rosoff testified nothing in appellant's demeanor on March 4 indicated he did not know what was going on; after an hour and 15 minutes, appellant hit the intercom button notifying the correctional officers that the interview was over. Appellant did not appear distracted or preoccupied with his own thoughts and Rosoff did not observe things he

would have expected if appellant was mentally ill, such as external restlessness, fidgetiness, expression of tension, hostility, inability to maintain composure, odd behavior or childlike behavior. He saw no evidence of schizoaffective disorder, which he described as a "devastating, major psychiatric disorder, progressive over time, resulting in an individual generally losing a lot of the capacity for selfcare." Appellant's refusal to talk to Rosoff was deliberate, goal directed behavior not consistent with schizoaffective disorder. Rosoff acknowledged that he could not actually rule out schizoaffective disorder and that a person with a lower level of the illness might not display its more extreme symptoms or be symptomatic all the time, and might be able to care for themselves but still suffer from delusions. He testified, however, that the level of schizoaffective disorder that would be consistent with auditory hallucinations commanding killing Donaldson would be "a very severe illness," and that he was "very close" to ruling out schizoaffective disorder as a diagnosis because appellant had been able to maintain at the county jail for over a year without psychiatric medication.

Rosoff testified that hallucinations and delusions could result from medical conditions and psychiatric disorders or from ingestion of substances, and that methamphetamine use over a period of time could result in a psychosis with the same types of symptoms as mental illnesses such as schizophrenia. Someone with a low level of schizoaffective disorder could have a psychotic episode triggered by methamphetamine use (or other factors); methamphetamine use would exaggerate the aggressiveness, irritability and anger of a person with antisocial personality disorder and could affect the person's behavior without creating a psychosis. One way to determine whether hallucinations and delusions are due to mental illness or substance abuse is from the individual's history of substance use; another is age of onset of the condition, as symptoms of schizophrenia usually begin in the person's twenties. Rosoff saw evidence of chronic methamphetamine use in appellant's history. He found no evidence of psychosis in appellant's twenties, but did find evidence of behavior consistent with

antisocial personality disorder. Rosoff did not view appellant's prison records as showing evidence of mental illness, and he concluded that appellant's suicide attempt was a response to anger at being held in the SHU for an extended time period, consistent with antisocial personality disorder in which a person is "easy to anger and very impulsive." Rosoff noted that the mental health professionals who saw appellant after the incident diagnosed substance induced psychosis and antisocial personality disorder, and that appellant reported using illicit drugs while in custody. The incident in which appellant said he tried to kick a guard because he was trying to find God did not reflect someone experiencing command hallucinations, because these usually would not be "so goal directed" and would involve self-injury rather than violence towards others, and appellant would have been observed talking to himself or acting in a strange and bizarre manner, not just making a single comment. Appellant's fasting was not consistent with schizoaffective disorder because "that type of deprivation . . . isn't psychotic in nature."

Rosoff testified that because appellant stopped taking antipsychotic medication when he was discharged from parole, if he had been suffering from schizoaffective disorder, psychotic symptoms such as neglect in his capacity to care for himself, erratic moods, illogical thinking and strange behaviors would have returned. Rosoff testified that people experiencing command hallucinations do not go along with every command, but rather attempt to regulate their behavior and maintain awareness of the likely risks they present. A person with schizoaffective disorder would be better at controlling an impulse to do something than a person with antisocial personality disorder, because the latter has difficulty with self regulation. The post-parole letters in which appellant referred to the Bible and terrorists did not reflect psychosis and delusional thinking, but rather "venting" of anger and suspicion such as might be seen "in an adolescent who is really frustrated about their situation in life." Appellant's records indicated he had a strong interest in "scriptures, eastern philosophy and Jehovah Witness," and his letters

reflected a compilation of these belief systems and were probably "driven" by the effects of a stimulant such as methamphetamine rather than a "bona fide psychotic disorder."

Rosoff did not believe appellant's killing of Donaldson was brought about by mental illness because the act was "organized and followed a logical sequence," with no bizarre or ritualistic aspects. Appellant's telling his mother he "whacked" Donaldson and asking for a sleeping bag reflected awareness and understanding of the type of offense that had occurred, which would be inconsistent with schizoaffective disorder. Appellant's trial testimony about the force he felt compelled to follow did not rise to the level of a command hallucination, which Rosoff testified would most often be described as an outside voice the person could describe in detail; his trial testimony reflected some irrational thoughts, but they did not rise to the level of a delusional belief system. The brutality of the killing and subsequent acts attempting to disengage the telephone, preventing Mancuso from calling 911, and getting a sleeping bag all "speak very clearly to antisocial personality disorder" because of the impulsivity, violence and rage associated with the act. Appellant's sitting on the porch after the killing was inconsistent with schizoaffective disorder in that appellant maintained his composure until his arrest, without strange or peculiar behavior, and consistent with antisocial personality disorder in reflecting a lack of remorse.

Clinical psychologist Tom Cushing was also appointed to evaluate appellant. In early April 2007, having been informed that appellant had refused to meet with another examiner, Cushing asked a correctional officer to find out whether appellant would be willing to meet with him and, based on the information he received, did not go to the jail. When Cushing subsequently went to the jail on February 25, 2008, after the prosecutor asked him to try again to interview appellant, appellant sat down in the interview room and did not say a word. Cushing initially wondered whether a medical problem was preventing appellant from responding verbally or even hearing him, but it became apparent that appellant could hear and there did not appear to be a problem with his

comprehension: For example, when Cushing asked how they were supposed to communicate the end of the interview to the correctional officers, appellant stood up and pushed the intercom button. Appellant exhibited a sense of humor, which was inconsistent with paranoia, and was organized in his thinking and presentation, in control of himself and exercising a volitional choice not to interact verbally, which was not what Cushing would expect to see in a person with a psychosis.

After reviewing appellant's records, including prison and medical records, Kastl's reports, and transcripts of appellant's and Kastl's testimony, Cushing concluded that Kastl's diagnosis of schizoaffective disorder was not supported and a diagnosis of antisocial personality disorder was supported.[6] Cushing testified that antisocial personality disorder is not a mental illness but an ongoing pattern of behavior, usually starting in childhood and continuing into adulthood. Cushing found no data convincing him appellant had experienced valid and factual auditory hallucinations or delusions, one of which would be required for a diagnosis of schizoaffective disorder, and no evidence of a long-term psychotic disorder produced by drug use. Rather, appellant's childhood history, drug use, failure to maintain regular employment, criminal conduct, behavior in prison and lack of remorse suggested a diagnosis of antisocial personality disorder.

Cushing testified that an auditory hallucination is a definite and identifiable voice that the person can recall in great detail. The commands are typically short and

[6] Kastl subsequently testified that he felt Cushing had insufficient information from his observation of appellant to make a definitive conclusion about appellant's mental state. In response to Kastl asking appellant why he had cooperated with him but not with other examiners, appellant said he had decided to trust only one examiner and had heard in jail that he should not cooperate with other examiners. Kastl acknowledged, however, that after Cushing's unsuccessful interview, Dr. Apostle, one of the experts appointed with regard to appellant's insanity plea, met with appellant and was able to interview him. Appellant did not exaggerate deficits with Apostle and denied mental illness. He told Apostle a different version from what he told Kastl about the events of October 15, 2006. Appellant also cooperated with Dr. Andew and Dr. Podboy, who were appointed to evaluate his competence to stand trial.

nonspecific, such as to "leave" or "hide," but not to drive through a red light, rob a store or punch a person. According to Cushing, malingering is suspected when the person cannot identify the voice or recall the words said, and when auditory hallucinations are offered as an explanation for illegal behavior. People with auditory command hallucinations more often than not do not act on them. Delusions, like hallucinations, remain with the person like "indelible ink," remembered in specific detail years later. A person can have delusional ideation and not be psychotic.

Cushing saw no evidence of hallucinations or delusions associated with appellant's suicide gesture, and his subsequent conduct with respect to a hearing on the incident was inconsistent with schizoaffective disorder in that it was "an organized, well thought-out response and a clear understanding of the grievance procedures." Appellant's attempt to kick a guard and comment about trying to find God was more consistent with an antisocial personality disordered person "flippantly offering an explanation to excuse his behavior" than with hallucinations or delusions. Appellant's assaults on guards and rule violations were consistent with someone who was angry, resentful and impulsive, and appellant's report that God told him to spit on a guard, for example, was inconsistent with an auditory command hallucination, which would not direct a specific act. Appellant's letters reflected spiritual thoughts, rage, and anger at the government, and were similar to letters Cushing had read that were written by adolescent males.

Cushing testified that appellant's testimony at trial was sufficient to rule out the presence of a delusional disorder: Appellant never stated he actually heard a voice, which confirmed that his reports of auditory hallucinations emanating from God were not factual; he was responsive to structured questions; his "free associative ramblings" did not reach the level of psychosis or delusional thinking; and the fact that he did not remember a letter he had written regarding the concert the night before Donaldson's death, but then made some associations when shown a ticket to the concert, was

"confirmation . . . of somebody who is free associating as opposed to being truly delusional."

Cushing testified that appellant's explanation of the force commanding him to kill Donaldson was not consistent with a delusion and that a "knowing" such as appellant described was too vague to be consistent with either a hallucination or a delusion. Cushing viewed appellant's sitting on the porch after Donaldson's death as consistent with "affective violence," an impulsive act of rage followed by the person being subdued as adrenaline leaves the body, which is not associated with schizoaffective or thought disordered forms of violence. If appellant had killed Donaldson while experiencing a valid religious delusion, the killing would have been consistent with a religious theme, such as by use of a religious object or with religious staging, or the person saying prayers. Also, the symptoms of a valid hallucination or delusion would not remit within a few minutes or hours of the act. Appellant's asking for a sleeping bag, saying he whacked Donaldson, and taking the phone away from Mancuso were consistent with an antisocial personality disordered person who was in touch with reality, but not at all consistent with someone in the throes of a psychotic episode. Appellant's trial testimony that he put things together about what had happened with Donaldson after he was in jail was completely inconsistent with a true delusional disorder, in which there would be a fixed conviction with no ambiguity or subsequent "figuring it out."

Surrebuttal

Kastl disagreed with the proposition that auditory hallucinations never involve a person being ordered to commit violence against a specific person, testifying that individuals sometimes have very specific commands and generally follow them. According to research he cited, persecutory delusions are more likely to be acted on than any other type, and this was "unequivocally" the type from which appellant was suffering. Kastl testified that there was no foundation in the scientific literature for the view that hallucinations are remembered like "indelible ink" by those who experience

them. He believed that appellant was both hallucinatory and delusional in 2006, as is often the case in a schizophrenic disorder with a delusional or paranoid cast. Kastl testified that with a concocted psychological defense, the evidence of disorder usually arises at the time of the offense, without a history such as that reflected in appellant's reports. Kastl noted that a psychiatrist in 1995 believed appellant had a major mental illness and obtained a court order for treatment, which was effective in that there was a period in which appellant did not manifest hallucinations and delusions. When appellant went off parole and stopped taking his medication, there was an acute increase in delusional thinking, as evidenced by letters he wrote. The fact that appellant's siblings came from Nevada to try to find help for appellant factored "greatly" into Kastl's evaluation of how long appellant had been suffering from delusions. Appellant consistently tried to convince Kastl he had never had a mental illness, which was the opposite of malingering.

Kastl had explained earlier that he did not use the Minnesota Multiphasic Personality Inventory (MMPI) as part of his evaluation of appellant because it involves leaving materials with the test subject and in an incarceration setting this "opens the door to their discussions with other inmates" and "to all kinds of distortions that are possible, so we may not get an honest account." Cushing then testified that he always used the MMPI as part of this kind of evaluation, after which Kastl administered the test to appellant during a break in the trial. Kastl testified that the interpretive report indicated appellant was not malingering and stated the most likely diagnosis was schizophrenia, possibly paranoid type or a delusional disorder, which was consistent with Kastl's diagnosis. Cushing later testified that the data from the MMPI had not been analyzed with the appropriate scales and certain of appellant's scores were inconsistent with his history, indicating his responses had not been truthful. Cushing stated that the data did not support a finding that psychotic symptoms were present because appellant's score on bizarre mentation was in the normal range whereas if appellant was in an active psychotic

state when he took the test, as the computer interpretation indicated, the bizarre mentation scale should have been elevated.

After appellant was found guilty of murder, the jury was presented with additional testimony on the question whether appellant was legally sane at the time of the killing. Dr. Kastl testified that he believed appellant knew the nature and quality of his acts on October 15, 2006, but did not understand that these acts were morally or legally wrong because he believed he was operating under the higher authority of God's law. Kastl opined that appellant was insane at the time of the killing, suffering from schizoaffective disorder; appellant also had antisocial personality disorder, but the two conditions are not mutually exclusive. Dr. Rosoff testified that he believed appellant understood the nature and quality of his acts at the time of the killing and understood his acts were morally wrong. He explained that appellant's request for a sleeping bag showed he knew his behavior was wrong and he needed to cover his tracks. Rosoff acknowledged that appellant had been psychotic in the past and that he could not absolutely rule out the possibility that he was suffering from psychotic illness at the time of the killing, but opined that the facts of the case did not support a conclusion that appellant was in a delusional state. Psychiatrist Donald Apostle also testified that appellant knew the nature and quality of his acts at the time he killed Donaldson and knew they were morally and legally wrong, as evidenced by his asking for the sleeping bag and pulling the phone out of the wall to prevent Mancuso from calling 911.[7]

[7] Apostle testified that when he examined appellant at his office on April 3, 2007, appellant was cooperative, astute and "tuned in" to the interview, and showed no symptoms of psychosis. The fact that appellant was off his medication and able to control himself and talk rationally made Apostle doubt the diagnosis of schizoaffective disorder. Apostle thought that appellant had a long standing antisocial personality disorder, was paranoid and projecting his own anger and impulses onto Donaldson, and his condition was aggravated by methamphetamine intoxication.

DISCUSSION

I.

Appellant contends the trial court erred in admitting evidence of statements appellant made to a nurse after his arrest and evidence of appellant's statements and silence while being transported to jail. He maintains these rulings violated *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

At an Evidence Code section 402 hearing, Detective Snyder testified that he was present when appellant's blood was drawn at the hospital. The nurse asked appellant whether he had used drugs in the last 48 hours and appellant responded that he had used methamphetamine the night before and smoked marijuana that day. Snyder was an observer; he did not ask appellant any questions. After evidence was collected at the hospital, appellant was transported to the police station, where Snyder advised appellant of his *Miranda* rights. Appellant sat calmly in a chair, paid attention and said he understood his rights. When Snyder asked if appellant wanted to waive his rights and talk with the police, appellant said he "only answered to God." Snyder terminated the interview. Subsequently, Police Officers Richard Towle and Hardesty transported appellant from the police station to the county jail. Towle told appellant that his mother thought he had killed Donaldson and appellant replied, "Yeah." Towle asked what he should tell appellant's mother and appellant said "something to the effect they can believe what they want." Towle said to appellant, "she didn't kill herself, did she," and appellant responded, "you never know." Towle acknowledged that these were questions he asked in order to elicit a response.

The parties agreed that the statements appellant made while being transported violated *Miranda*, but the prosecutor argued it was not a "blatant violation" because the transporting officers were acting in good faith. Defense counsel urged that officers transporting a homicide suspect have a duty to know whether the suspect has been given *Miranda* warnings before asking questions and that evidence of appellant's statements

should not be admitted for any purpose. The prosecutor stated that he did not intend to introduce these statements in his case in chief, but that he should be able to use the evidence in rebuttal if the defense put at issue appellant's state of mind at the time of the killing.

The court found that although it was "somewhat questionable, . . . it appeared" that appellant invoked his *Miranda* rights at the police station prior to transport, in part because the police officer understood appellant's statement this way and terminated the interview. Since appellant was in custody while he was being transported to jail, the court ruled that Towle's questions constituted custodial interrogation in violation of *Miranda,* and evidence of the questions and appellant's responses could not be presented in the prosecution's case in chief. The court reserved ruling on whether the evidence could be presented for a different purpose, such as impeachment or in response to expert testimony regarding appellant's state of mind.

The issue then arose when the prosecutor was questioning Dr. Cushing about whether appellant's behavior after the killing was consistent with his having been in a psychotic state at the time of the killing. Cushing testified that if appellant had been experiencing a valid delusion and/or hallucination, the symptoms would not disappear within minutes or hours of the act, but would continue after the police arrived and for some time thereafter while appellant was in jail. The same would be true with a methamphetamine induced psychosis; Cushing reiterated his earlier testimony that such a psychosis typically would remit within four weeks. After eliciting Cushing's testimony that he had reviewed the report of the police officer who transported appellant to jail, the prosecutor asked whether, if appellant "according to the reports, had almost nothing to say until asked a couple of questions at the very end—would that be consistent?" At this point, defense counsel objected and, outside the presence of the jury, moved for a mistrial or dismissal based on prosecutorial misconduct and error under *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). Defense counsel argued that the prosecutor's question

implicated the pretrial *Miranda* rulings and constituted comment on appellant's silence after being given *Miranda* warnings in violation of *Griffin* and *Doyle*, *supra*, 426 U.S. 610. The prosecutor explained that he was not commenting on appellant's silence as evidence of guilt, but rather trying to ask Cushing whether appellant would have "sat there not saying anything" if he was in the throes of a psychotic episode. The prosecutor stated he was not going to ask Cushing what statements appellant made, but what his behavior indicated in light of his testimony that a psychotic episode would continue for a period of time. The court denied the motions for mistrial and dismissal, concluding that *Griffin* and *Doyle* were concerned with situations where a prosecutor was arguing that a defendant's silence is an indication of guilt whereas the prosecutor here was addressing appellant's psychological state with respect to his claim of psychosis.

When questioning resumed, the court granted a defense request for a continuing objection on this issue. The prosecutor asked whether there was anything in the ride to jail that was inconsistent with appellant having killed Donaldson in a psychotic episode, and Cushing responded affirmatively. Asked what he would expect to have seen, Cushing stated, "[d]ifferent behavior and comments than were evidenced by Mr. Roberts." Cushing testified that he would be looking for "consistent behavior and comments with the hallucination or delusion before, during and after the commission of the act," and that these were not present during the ride to jail.

Appellant renewed his motion for mistrial the following day. Again, the court declined to view the situation as involving comment on appellant's silence in violation of the caselaw. The court stated it was "evidence of impeachment of Dr. Kastl and specifically as to the reasons for his opinion, in that the defendant was acting in conformity according to the other doctor, Cushing, with someone who suffered a command delusion. And the statement or lack of statement itself was not the issue. [¶] As the Court saw it, it was the behavior of the defendant that was inconsistent with someone who was suffering from the mental issues that were brought up by Dr. Kastl.

And there was nothing said about *Miranda* and the statement or lack of statements, was not, at least the Court didn't get the impression, that was not offered for the purpose of showing that the defendant refused to talk, or he made the statement that was inconsistent with something else he did, or whatever. It was only to show whether or not he had suffered from the mental illness that was discussed by Dr. Kastl." After taking a recess to review the authorities appellant had cited, the court denied the mistrial motion. The court subsequently instructed the jury "to consider the defendant's behavior and silence on the ride to the jail only for the specific purpose of evidence as to whether the defendant was or was not experiencing a major mental illness. So you're only to consider that information for that particular purpose."

Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, 384 U.S. at p. 444.) The defendant may waive his or her rights under *Miranda*, but all questioning must cease if the defendant so wishes, or indicates a desire to consult with counsel before speaking to the police. (*Id.* at pp. 444-445.) Statements obtained in violation of *Miranda* may not be used in the prosecution's case in chief, although they may be admissible to impeach the defendant's credibility if they meet legal standards for trustworthiness. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1193.)

Doyle prohibits the prosecution from using the defendant's silence after being advised of his *Miranda* rights to impeach his trial testimony. (*Doyle, supra*, 426 U.S. at p. 619; *People v. Earp* (1999) 20 Cal.4th 826, 856.) "The warnings mandated by [*Miranda*], as a prophylactic means of safeguarding Fifth Amendment rights [citation], require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of

these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. [Citation.] Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle,* at pp. 617-618, fns. omitted.)

The prosecutor in the present case accepted that Towle's questions while appellant was being transported to jail constituted custodial interrogation and did not refer to these questions or appellant's responses to them in its case-in-chief. The evidence upon which appellant bases his claim was introduced in examining Dr. Cushing as a rebuttal witness, after appellant presented the defense that he was suffering from schizoaffective disorder at the time of the offense. Appellant argues that this violated *James v. Illinois* (1990) 493 U.S. 307, 308-309, which held that illegally obtained evidence may not be used to impeach defense witnesses other than the defendant. *James* explained that the exception permitting use of illegally obtained evidence to impeach a defendant resulted from the Supreme Court's belief "that permitting the use of such evidence to impeach defendants' testimony would further the goal of truthseeking by preventing defendants from perverting the exclusionary rule ' "into a license to use perjury by way of a defense" ' " and "would create only a 'speculative possibility that impermissible police conduct will be encouraged thereby.' " (*James v. Illinois,* at p. 313.) With respect to impeachment of other defense witnesses, however, "[t]he court explained that the concern with perjury . . . is insufficient to allow the state to 'brandish' illegally obtained evidence as a sword to chill defendants 'from presenting their best defense—and sometimes any defense at all—through the testimony of others.' (*Id*. at pp. 314-315.) Moreover, the court indicated, extending the 'impeachment' exception beyond the narrow confines of the accused's own

testimony to all defense witnesses would unduly encourage police misconduct by preserving a broad area in which the evidence could be used despite its illegal procurement. (*Id*. at pp. 317-319.)" (*People v. Boyer* (2006) 38 Cal.4th 412, 462.)

The prohibition against admission of evidence obtained in violation of *Miranda* applies to testimonial, as distinguished from " 'real or physical' " evidence. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 590-592.) Testimonial communications " 'explicitly or implicitly, relate a factual assertion or disclose information.' " (*Id.* at p. 594, quoting *Doe v. United States* (1988) 487 U.S. 201, 210.) The privilege does not protect a defendant against having to reveal physical characteristics, such as fingerprints or a handwriting or voice sample. (*Pennsylvania v. Muniz*, at pp. 590-592.) Thus, in a drunk-driving prosecution, statements taken in violation of *Miranda* that revealed the defendants mental faculties were impaired—he did not remember the date of his sixth birthday—were inadmissible, but the fact that his speech was slurred was admissible. (*Id.* at pp. 590-591.) "The physical inability to articulate words in a clear manner due to 'the lack of muscular coordination of his tongue and mouth,' . . . is not itself a testimonial component of Muniz's responses to Officer Hosterman's introductory questions." (*Ibid.*)

Here, the content of the statements appellant made while being transported to jail was never introduced into evidence; the statements were related only at the hearing held outside the presence of the jury. Dr. Cushing's testimony about appellant's ride to jail was that something in the ride to jail was inconsistent with appellant having killed Donaldson during a psychotic episode in that "consistent behavior and comments with the hallucination or delusion before, during and after the commission of the act" was not evidenced during the ride to jail. Appellant's claimed violation of *Miranda*, therefore, is really based only on the alleged improper comment on appellant's silence in the face of custodial interrogation after being given *Miranda* warnings, in violation of *Doyle.*

Respondent argues that Cushing's testimony did not address appellant's silence in response to police questioning, but rather his demeanor during the ride. Evidence of

demeanor does not implicate the privilege against self incrimination. (*U.S. v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023.) In *Velarde-Gomez*, the prosecution elicited testimony that the defendant had "no response" and "just sat there" when told customs agents had discovered a large quantity of drugs in his car, and argued that the fact the defendant remained relaxed when confronted by the customs agents showed he was the sort of person a drug trafficking organization would want to hire. (*Id.* at pp. 1027-1028.) The court rejected the prosecution's argument that it was commenting on the defendant's demeanor rather than on his silence, stating that evidence of "lack of response" *is* evidence of silence. (*Id.* at p. 1031.)

In the present case, by contrast, Dr. Cushing did not testify that appellant remained silent in response to police questioning. He testified that appellant did not display behavior and comments consistent with having a hallucination or delusion before, during and after the killing. The only time appellant's silence during the transport was mentioned was in the prosecutor's question, cut off by the defense objection, about Cushing's review of the police report: "And if that jail were the Hill Road jail and Mr. Roberts, according to the reports, had almost nothing to say until asked a couple questions at the very end—would that be consistent?" The question was not answered. Moreover, the context in which it was asked—as part of a line of questioning addressing the duration of a psychotic episode and what behavior Cushing would expect to see shortly afterward if appellant had killed Donaldson during such an episode—made crystal clear that Cushing was being asked about an illustrative example of appellant's behavior rather than any inference to be drawn from his response to police questioning.

As appellant recognizes, "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' [Citation.] *Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause

requires." (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291, fn. omitted (*Wainwright*).) In *Wainwright*, the prosecution introduced evidence that when given *Miranda* warnings, the defendant said he understood his rights and wanted to speak with an attorney before giving a statement. (*Id.* at pp. 286-287.) The defendant pled not guilty by reason of insanity and presented expert testimony that he suffered from paranoid schizophrenia and was unable to distinguish right from wrong at the time of the alleged offense. *Wainwright* rejected the prosecution's argument that *Doyle* did not apply where the issue was proof of sanity rather than proof of commission of the underlying offense. (*Id.* at p. 292.) "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations." (*Ibid.*)

The situation in *Wainwright* differs significantly from that in the present case. The prosecution in *Wainwright* sought to use evidence that the defendant said he understood his *Miranda* rights and did not want to speak without an attorney present to demonstrate that the defendant's level of comprehension was inconsistent with his claim of insanity. Here, the point of the evidence was not that appellant was silent in the face of *Miranda* warnings, but that his overall conduct was inconsistent with what would be expected from a person who had been in the throes of a psychotic episode shortly before. The connection to *Miranda* warnings was irrelevant to Cushing's point and, indeed, no such connection was suggested to the jury. The *Wainwright* court explained that "the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the

time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." (*Wainwright, supra*, 474 U.S. at p. 295, fn. omitted.) Here, Cushing's testimony did not refer to appellant's exercise of his constitutional rights and the court's limiting instruction to the jury further assured the testimony would not be taken the wrong way.

With respect to appellant's statements to the nurse when his blood was drawn after his arrest, defense counsel argued that because the nurse was unknown, the evidence was inadmissible as unreliable hearsay. He also argued that although the police officer did not ask the question, it was asked in the presence of the officer as part of an investigation with appellant in custody and therefore should not be admissible under *Miranda*. The court found no evidence the nurse was an agent of the police or her questions asked "for something other than the treatment of the defendant and the taking of the blood samples and so forth," and "the fact that an officer happened to be standing nearby and overheard a conversation between two people does not mean that that's a violation of *Miranda*." The court was not persuaded by defense counsel's argument that appellant was not at the hospital for treatment but only for the collection of evidence, stating the nurse was "working on behalf of the hospital as to information that she needs in order for an appropriate blood draw in a medically-approved manner."

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301.) Appellant points out that medical personnel can be agents of the

police for *Miranda* purposes (*People v. Ghent* (1987) 43 Cal.3d 739, 750-751) and urges that "the critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused." (*People v. Whitt* (1984) 36 Cal.3d 724, 742 (*Whitt*).)

Whitt was concerned with the admissibility of statements made by the defendant to a police informant, his jail cellmate. In determining whether the statements were "deliberately elicited" in violation of the defendant's Sixth Amendment right to counsel, the court considered whether the circumstances demonstrated that the informant was acting as a police agent, noting that "if an informant interrogates an accused, but acts on his own initiative rather than at the behest of the government, the government may not be said to have deliberately elicited the statements." (*Whitt, supra,* 36 Cal.3d at p. 742.) *Whitt* explained that the focus of the inquiry is "on the state's conduct as a whole, rather than on the informant's," and that the requisite complicity could be found "where the state has directed an informant to obtain incriminating information, or where it has created powerful inducements for him to do so." (*Id.* at pp. 741, 745.) *Whitt* concluded that, despite the officer who transported the informant to jail (not knowing he was an informant), having asked the informant to contact him if he heard anything about homicides, the informant had not received any promises of leniency or favorable treatment and the evidence did not support a finding "that the police gave [the informant] the incentive to obtain information from Whitt . . . to such an extent that [the informant's] conduct is attributable to the state." (*Id.* at p. 744.)

Here, appellant's argument is based on the fact that the police brought appellant to the hospital to collect evidence, not for treatment. There was no evidence, however, that the police asked the nurse to attempt to obtain any particular information from appellant. In the cases appellant relies upon to demonstrate that medical personnel can act as agents of the police, the personnel in question were specifically engaged by the police to collect the evidence that was then sought to be used against the defendant. (*People v. Ghent,*

supra, 43 Cal.3d at p. 750 [People conceded that psychiatrist retained by the sheriff's department "was a police agent whose 'interview' constituted a continuation of the prior interrogation"]; *People v. Polk* (1965) 63 Cal.2d 443, 449 [psychiatrist who interviewed defendants at request of district attorney's office was prosecution agent]; *People v. Montgomery* (1965) 235 Cal.App.2d 582, 588-590 [neuropsychiatrist interviewed defendant at request of district attorney " 'with a view towards being a possible witness for the prosecution' "].) The nurse in the present case was directed to collect blood for police use, but there was nothing to indicate that the questions she asked appellant were asked at the behest of the police rather than of her own initiative.

II.

Appellant also contends his conviction must be reversed because the prosecution committed misconduct by accusing defense counsel of making inappropriate comments to the jury. The argument is based on the prosecutor's statement in closing argument: "There's no evidence that the People didn't choose to call Dr. Apostle. There's no evidence as to whether he's available or not, or whether he's got opinions on this issue that's before us or not, and there's no speculation that's permitted, trying to make it sound like, well, we didn't call enough people to our case. You don't have that evidence. *That's an inappropriate comment on the evidence*." (Italics added.) The prosecutor's statement was a response to defense counsel pointing out in his argument that "[t]he People chose not to call Dr. Apostle."

As indicated above, appellant cooperated with the evaluation performed by Dr. Kastl, who concluded he was suffering from schizoaffective disorder and testified for the defense, but refused to talk to Drs. Rosoff and Cushing, who disagreed with Kastl and believed appellant had antisocial personality disorder and was not psychotic at the time of the killing. In closing argument, the prosecutor argued that appellant's refusal to talk to Rosoff and Cushing showed he was not psychotic, but rather manipulating the situation. "He's had it with these doctors. They can only hurt him, because he knows. He knows

the truth. And the truthful thing he told us is he has not ever, nor is he now mentally ill. But it's going to help him to be mentally ill as a defense, so hey, Dr. Kastl wants to run with it, fine. I'm certainly not going to give these other doctors more ammunition to shoot it down, so I'm just not going to talk to them." The prosecutor continued that Rosoff and Cushing had said that a person who was mentally ill, or who had been accused of being mentally ill and wanted to demonstrate the truth or falsity of the accusation, would talk to the interviewer. "There's only one good explanation and that's manipulation, and that's consistent with antisocial personality disorder."

Defense counsel, in closing argument, argued that after cooperating with Kastl, who was first appointed to assist the defense, appellant began to refuse to talk to doctors after being transported in the very restrictive "black box" restraints to meet with Rosoff. Defense counsel then argued: "But we also know something else about another witness the People didn't choose to call, about Dr. Apostle. We have heard and had testimony that Dr. Apostle met with my client after Dr. Rosoff and Dr. Cushing failed to. And Dr. Apostle did meet with him. Dr Apostle formed opinions, and Dr. Kastl reviewed them and talked about them during his testimony.

"The People chose not to call Dr. Apostle, which is their right, but it's also your right to consider those things. It is not the case that my client has refused to talk to every doctor. You've also heard testimony that he's talked to two other doctors. He's talked to a Dr. Podboy and Dr. Madeline—the last name escapes me right now. So you know he's talked to other doctors.

"Now, why is that important? Well, it's important because how the prosecution tries to discredit what the defense is here, because you've already heard that the primary theory of the prosecution, in trying to defeat our defense, is that my client is a manipulative antisocial personality disordered person, and that he is trying to manipulate the whole system and trying to manipulate the trial and manipulate his defense and manipulate the evidence and manipulate the doctors."

The prosecutor responded by referring, in rebuttal, to "a comment in closing argument that has no basis in the evidence. [¶] There's no evidence that the People didn't choose to call Dr. Apostle. There's no evidence as to whether he's available or not, or whether he's got opinions on this issue that's before us or not, and there's no speculation that's permitted, trying to make it sound like, well, we didn't call enough people to our case. You don't have that evidence. That's an inappropriate comment on the evidence. The lack of it's not there, so it can't be commented on the evidence."

Defense counsel objected to the characterization of him having made an inappropriate argument, asking for it to be stricken because it was an "in persona attack and inappropriate attack," and noting that the prosecutor had not objected at the time. The court denied the motion to strike, finding that the prosecutor's comment was not a personal attack but a "response to a comment that you made."

Appellant argues that it is misconduct for a prosecutor to accuse defense counsel of attempting to mislead the jury. *People v. Perry* (1972) 7 Cal.3d 756, upon which appellant relies, stated, " 'The conviction of a defendant of the crime of which he is accused should rest not even slightly upon the dereliction (if any) of his counsel, but ordinarily should be grounded upon acts committed by the defendant . . . .' (*People* v. *Pantages* [(1931)] 212 Cal. 237, 244.)" (*People v. Perry*, at p. 790.) The prosecutor in *Perry* read from a United States Supreme Court opinion stating that while the prosecutor's only function is to expose the truth, "defense attorneys will often cross-examine a prosecution witness and try to impeach him even if the witness is known to be telling the truth," questioned the sincerity of one of the defense attorneys in challenging the sufficiency of a police report, disparaged a defense attorney's closing argument, and accused defense counsel of unethical conduct and the defense investigator of trickery with respect to obtaining a witness's statements. (*Id.* at p. 789.) The court stated, "In net effect, the prosecutor attacked the defense attorneys because, according to him, defense counsel were not ethically obligated to present the facts and so were free to obscure the

truth and confuse the jury." (*Ibid.*) Although it found prosecutorial misconduct, the court did not find the error reversible because the remarks were brief in the context of the entire trial and were made in response to "defense counsel's inflammatory attack upon the prosecution." (*Id.* at pp. 790-791.)

In *People v. McCracken* (1952) 39 Cal.2d 336, the prosecutor argued that defense counsel had directed the defendant what story to tell and subsequently said, ". . . Jurors, that's not true—most damnable thing that I believe I ever heard stated in a courtroom—a little ten-year-old girl, gone to her God, not a smear or blemish on her except what this defendant said. *What some people won't do for a fee*." (*Id*. at p. 348.) The court found the prosecutor's conduct "highly improper," but insufficiently prejudicial to require reversal of the conviction. (*Id.* at p. 349.)

The prosecutor's remarks in the present case do not rise to the level of those in the cases appellant relies upon. Defense counsel brought up the subject of the prosecution not having presented Dr. Apostle as a witness and argued it was important to recognize that appellant had talked to Apostle and other doctors because the prosecution was trying to discredit the defense by suggesting appellant was trying to manipulate the evidence. The prosecutor responded by stating that defense counsel's remarks were inappropriate because there was no evidence to support the assertion that the prosecution deliberately chose not to call Dr. Apostle.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before

the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

A prosecutor "has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. (See *People v. Frye* (1998) 18 Cal.4th 894, 977-978 [no misconduct where prosecutor accused counsel of making an ' "irresponsible" ' third party culpability claim]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said counsel can ' "twist [and] poke [and] try to draw some speculation, try to get you to buy something" '].)" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) "Although the prosecution may not attack defense counsel's integrity, it may, and the prosecutor here did, vigorously attack the defense case and argument if that attack is based on the evidence. In turn, the defense may attack the prosecution case and argument, as defense counsel did here. (*People v. Hill* [(1998)] 17 Cal.4th [800,] 832; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1218.)" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

In *People v. Frye*, *supra*, 18 Cal.4th at pages 977-978, the defendant claimed the prosecutor improperly denigrated his attorney in closing argument by stating that it was " 'completely irresponsible' " for defense counsel to have suggested other individuals, including a prosecution witness, might have murdered the victims without evidence to back up the suggestion, and that the defense argument that a witness was lying about having seen the murders was " 'ludicrous' and 'a smoke screen.' " *Frye* explained, "[a] defendant's conviction should be based on the evidence adduced at trial, and not on the purported improprieties of his counsel. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) When a prosecutor denigrates defense counsel, it directs the jury's attention away from the evidence and is therefore improper. (*Id.* at pp. 183-184.) In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire

whether the former constitutes a fair response to the latter. (*U.S. v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 597.)" (*People v. Frye, supra,* 18 Cal.4th at p. 978.) The court stated that the point of the prosecutor's criticism of defense counsel as " 'irresponsible' " was the "lack of evidentiary support" for the claim defense counsel was making, and found that "[b]ecause the focus of [the prosecutor's] comment was on the evidence adduced at trial, rather than on the integrity of defense counsel, it was proper." The prosecutor's characterization of defense counsel's challenge to the witness's credibility was not objectionable because it was made in the context of an argument that there was no evidence tying the murders to the time frame on which the defense's challenge to the witness's credibility was based, and therefore was a "fair response to defense argument challenging [the witness's] testimony, and reflected the prosecutor's belief in the inadequacy of the evidence relied on by the defense." (*Ibid.*)

Here, as we have stated, the prosecutor characterized the defense argument (not defense counsel) as "inappropriate" because it was not based on any evidence, and did so in direct response to defense counsel's suggestion that the prosecution had deliberately refrained from presenting Dr. Apostle as a witness. In the context of the arguments as a whole, there was little if any chance the jury would have viewed the prosecutor's remark as a comment on defense counsel's integrity rather than on the stated lack of evidence for the particular comment the prosecutor challenged.

The judgment is affirmed.

_____
Kline, P.J.

We concur:

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Lambden, J.

_____
Richman, J.